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OFFICE OF ATTORNEY GENERAL
STATE OF OKLAHOMA

May 22, 1997

Office of the Secretary
Federal Communications Commission
Washington, D.C. 20553

CC
Re: ~~FCC~~ 97-121

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To Whom it May Concern:

Pursuant to the FCC procedures for Bell operating company applications under Section 271 of the Telecommunications Act, please find enclosed reply comments of the Oklahoma Attorney General in opposition to Southwestern Bell Telephone's application to provide in-region interLATA services in Oklahoma. Please return in the enclosed envelope a file-stamped copy.

Sincerely,

Mickey S. Moon
Assistant Attorney General

MM:rs

Enclosures

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BEFORE THE FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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In the Matter of)
)
Application of SBC Communications, Inc.,)
Southwestern Bell Telephone Company,)
and Southwestern Bell Communications)
Services, Inc., d/b/a Southwestern Bell)
Long Distance for Provision of In-region)
InterLATA Services in Oklahoma)

CC Docket No. 97-121

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REPLY COMMENTS OF THE OKLAHOMA ATTORNEY GENERAL

The Attorney General of the State of Oklahoma ("Oklahoma Attorney General"), fulfilling his duty to represent and protect the collective interests of Oklahoma's consumers of telecommunications services,¹ and to guard against anticompetitive practices through enforcement of the antitrust laws, files these comments in opposition to the applicant's ("SBC") request to be granted in-region interLATA authority in Oklahoma. These comments incorporate, and the Oklahoma Attorney General herein restates, the comments filed in this Docket by the Oklahoma Attorney General on April 28, 1997. The Oklahoma Attorney General is also a signatory to the Joint Comments filed in this docket by the various state Attorneys General.

In his earlier comments, the Oklahoma Attorney General stated that the FCC must first determine if SBC has satisfied the requirements of § 271(c)(1) before considering § 271(c)(2) compliance. The Oklahoma Attorney General reaffirms his earlier comments that SBC has not satisfied the § 271(c)(1) requirements at this time. In these comments, however, the Oklahoma Attorney General assumes, *arguendo*, that SBC has satisfied the requirements of § 271(c)(1).

¹ Okla. Stat. tit. 74, § 18b(A)(20).

In that case, the analysis of SBC's compliance with the requirements of § 271(c)(2) is driven by which "Track" the Federal Communications Commission ("FCC" or "Commission") attributes to SBC's application. If the Commission finds that SBC has satisfied the requirements of "providing" access and interconnection to one or more unaffiliated competing providers of local exchange service, § 271(c)(1)(A), then SBC must be also "providing" the checklist items in § 271(c)(2)(B) through such interconnection agreements. If, on the other hand, the Commission finds that "no such provider" has requested access and interconnection, § 271(c)(1)(B), then SBC need merely offer the checklist items in § 271(c)(2)(B) through a Statement of Generally Available Terms ("SGAT").

Regardless of whether the FCC analyzes SBC's compliance with § 271(c)(2) in the context of SBC's approved interconnection agreements or its SGAT, "[a]ll factual assertions made by any applicant (or any commenter) must be supported by *credible evidence* or will not be entitled to any weight."² All of SBC's factual assertions contained in the affidavits attached to its application package constitute hearsay which is inherently not credible.³ The ALJ's Report, on

² Public Notice, issued Dec. 6, 1996, "Procedures for Bell Operating Company Applications under New Section 271 of the Communications Act" (FCC 96-2469), at 2 (emphasis added).

³ SBC refused to give any party the opportunity to cross examine any of the declarants of these out-of-court assertions. While the Administrative Law Judge ("ALJ") admitted these statements into the record in PUD 970000064, over the objections of the Oklahoma Attorney General and the other intervening parties, the ALJ nevertheless correctly noted that these "submissions would have a bearing on the weight, not the admissibility of, the parties' filings." Report and Recommendations of the Administrative Law Judge, PUD 970000064 (Okla. Corp. Comm'n, April 21, 1997) [hereinafter "ALJ Report"] at 4-5.

the other hand, is supported by credible evidence,⁴ and the ALJ, therein, found that “[t]he evidence in this case is that Southwestern Bell Telephone (“SWBT”) does not currently provide all checklist items. . . .” ALJ Report at 35.

The factual assertions contained in SBC’s application package, therefore, as well as the Oklahoma Corporation Commission’s (“OCC”) comments filed in this Docket (to the extent they rely on these factual assertions) are entitled to little, if any weight. The ALJ’s Findings of Fact, on the other hand, are based upon credible evidence, and the Commission should weigh them accordingly in its determination.

I. Assuming that SBC has met the requirements of § 271(c)(1) through Track A, in order to meet the further requirements of § 271(c)(2), SBC must be providing each of the competitive checklist items.

If SBC’s application is reviewed under Track A, § 271(c)(1)(A), then SBC must be “*providing* access and interconnection pursuant to one or more [interconnection] agreements,”⁵ and further, “such access and interconnection”⁶ must “include[] *each*” competitive checklist item.⁷ Therefore, if access and interconnection to SBC’s network facilities must be provided through interconnection agreements rather than generally offered through a SGAT, then the unambiguous language of § 271(c)(2) requires, at a minimum, that each checklist item included

⁴ As noted in the ALJ Report, SBC was given the opportunity to cross examine other parties’ witnesses but waived cross-examination except as to the witness presented by Brooks Fiber Company. ALJ Report at 5.

⁵ § 271(c)(2)(A)(i)(I) (emphasis added).

⁶ § 271(c)(2)(A)(ii).

⁷ § 271(c)(2)(B).

in the terms of those interconnection agreements must also be provided rather than generally offered.

The term “provided” means “to cause (a person) to have possession or use of something, to supply.” Oxford American Dictionary, 538 (1980). Thus, to satisfy the checklist requirements, SBC must be actually supplying and/or the unaffiliated competing providers must be actually using, each of the checklist items contained in the terms of the approved interconnection agreements.⁸ As the United States Department of Justice states (a statement in which the Oklahoma Attorney General fully concurs), “the presence of an operational competitor actually using the checklist elements is important in assisting the state commission and the FCC in determining . . . that the BOC has fully implemented the checklist elements set out in the Section 271(c)(2) checklist.”⁹

If such competing providers fail to use each of the checklist items contained in their interconnection agreements within a reasonable time after OCC approval of such agreements, the OCC can determine who is at fault, and, if it finds the competing provider has violated the terms of its implementation schedule, so certify to the Commission so that Track B can be made

⁸ The only exception to this requirement is checklist item number 14, § 271(c)(2)(B)(xiv), which, regardless of whether the FCC is reviewing SBC's application through approved interconnection agreements (Track A) or through a SGAT (Track B), *expressly* requires a BOC to merely make “available,” rather than provide, telecommunications services for resale. The significance of Congress' express use of the term “available” only as to this checklist item is that it further demonstrates the legislative intent (1) that some form of meaningful local competition under Track A should be a prerequisite to interLATA authority and that merely reselling a BOC's local exchange service can never satisfy the legislative intent of meaningful competition, and (2) that Congress intended that, in a Track A application, the BOC actually provide the other 13 checklist items through interconnection agreements, rather than just make them available (i.e., generally offer them) through its SGAT.

⁹ “Evaluation of the United States Department of Justice,” CC Docket No. 97-121, at 10 (May 16, 1997).

available. Absent such a finding, the OCC's conclusion that SBC meets the § 271(c)(2) requirements because each competitive checklist item is "either provided or generally offered"¹⁰ is contrary to the clear requirements of § 271(c).

A. There is no meaningful local competition to offset SBC's monopoly control in the local market.

SBC maintains that § 271 contains no requirement that there be any specifically quantifiable level of local exchange competition, or any requirement of meaningful competition for that matter. SBC is correct in that there is no *express* additional prerequisite of local competition, but the requirement of meaningful competition, nonetheless, is *implicit* in the Track A requirement that "each" of the checklist items must be "provided" through interconnection agreements with competitors.¹¹ In other words, the actual use of each of those checklist items by competing providers through their interconnection agreements is a signal that meaningful

¹⁰ Order No. 411817, PUD 970000064 (Okla. Corp. Comm'n, Apr. 30, 1997), at 3. At the appeal from the ALJ Report before the OCC *en banc*, a majority of the commissioners concluded that because none of the competing providers had complained to the OCC regarding SBC's failure to provide access and interconnection prior to this proceeding, the only reason the checklist items are not being used, therefore, must be due entirely to such competing providers' "internal business decisions" not to use them, rather than SBC's failure to provide each of the checklist items in their interconnection agreements. *Id.* Thus, the OCC indicated, SBC fully implements the competitive checklist in such a situation by merely offering the checklist items that are not being used. Clearly, this effectively and improperly puts the entire burden of fully implementing the competitive checklist items onto the competing providers and effectively relieves SBC of its obligation of providing them. If SBC wants interLATA authority under Track B, then SBC, not the competing providers, should have the burden of complaining to the OCC, and the burden of proof therein, that such competitors have failed to timely implement their interconnection agreements. SBC has met neither burden.

¹¹ Of course, the Oklahoma Attorney General strongly urges that the requirement of the existence of meaningful competition should also be a factor in the FCC's determination of whether granting SBC's application at this time would be "consistent with the public interest, convenience, and necessity." § 271(d)(8)(C).

competition exists. Brooks Fiber is currently the only SBC competitor taking any checklist items, and the undisputed fact that SBC is not providing (i.e., Brooks Fiber is not using) each of the checklist items contained in the terms of its interconnection agreement with SBC conclusively demonstrates the non-existence of meaningful competition in SBC's local exchange markets in Oklahoma.

B. SBC has failed to fully implement the competitive checklist requirements through its interconnection agreements.

Section 271(d)(3)(A)(i) requires full implementation of § 271(c)(2)(B) with respect to Track A applications. As stated above, full implementation of the competitive checklist requires SBC provision, and competing providers use, of each of the checklist items. The Commission need not look very far to find that SBC is not providing each of the checklist items through its interconnection agreements.

By way of example, checklist item (i) requires SBC to provide interconnection "that is at least equal in quality to that provided ... to itself." Checklist item (ii) requires SBC to further provide nondiscriminatory access to unbundled network elements. Brooks Fiber, whom upon SBC hangs its hat, is prohibited from using such access and interconnection due to SBC's failure to provide collocation to Brooks Fiber.¹² SBC's assertion that the delays in implementing collocation with Brooks Fiber were caused by order revisions and changes in the requirements for electrical power made by Brooks Fiber,¹³ is not credible evidence, and the Commission

¹² Initial Comments of Brooks Fiber Communications, PUD 9700000064 (Okla. Corp. Comm'n, March 11, 1997) at 3. *See also*, ALJ Report at 36.

¹³ *See* ALJ Report at 8 and *supra* note 2 and accompanying text.

should give no weight to this assertion. It is nothing more than a hearsay statement by a declarant who was not made available for cross examination.

II. Even if the Commission reviews SBC's compliance with the checklist items under Track B, SBC has failed to show by credible evidence that it can "offer" the checklist items in compliance with the competitive checklist requirements.

In order to *offer* interconnection pursuant to § 271(c)(2)(B)(i) "that is at least equal in quality to that provided ... to itself," § 251(c)(2)(C), there must be credible evidence that SBC is capable of providing Operational Support System ("OSS") functions to competing providers on a nondiscriminatory basis.¹⁴ AT&T's initial comments in PUD 970000064 provide credible evidence of SBC's incapability of providing such. On the other hand, SBC's factual (hearsay) assertion that its OSS capabilities have been designed and tested to support significant commercial activity by any requesting competing provider, including AT&T, in the same manner as those systems support SBC's retail service ordering,¹⁵ is not credible evidence and should be accorded no weight. The Commission should insist upon credible evidence that SBC's OSS will actually work *when* meaningful competition commences.

CONCLUSION

SBC has failed to satisfy the requirements of § 271(c)(1). *See* Oklahoma Attorney General's comments filed April 28, 1997. Assuming, for the sake of argument only, SBC has satisfied § 271(c)(1) through Track A, SBC has failed to *provide* the checklist items set forth in § 271(c)(2). Section 271 evidences Congress' intent that there be meaningful local exchange

¹⁴ *See* CC Docket No. 96-98, First Report and Order ¶ 516.

¹⁵ *See* ALJ Report at 8-9.

competition before SBC can enter the interLATA market. There is no credible evidence of such competition in Oklahoma. In fact, there *is* no meaningful competition in Oklahoma today. Therefore, based on the foregoing, the Attorney General respectfully urges the Commission to deny SBC's request.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Mickey S. Moon, do hereby certify that a copy of the foregoing *Reply Comments* was mailed by first class mail, postage prepaid, on this 23rd day of May, 1997.

Donald J. Russell

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